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September 29, 1994

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VIA HAND DELIVERY

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, NW
Washington, DC 20554

Re: Ex Parte Notice -- MM Docket 92-260 and RM-8380

Dear Mr. Caton:

In accordance with Section 1.1200 et seq. of the Commission's Rules, Time Warner Entertainment Company, L.P. ("Time Warner") hereby submits these comments regarding cable home wiring issues that were raised in meetings Time Warner held with various Commission staff members on September 9, 1994. Time Warner has been advised that Liberty Cable Company, Inc. ("Liberty"), a competing multichannel video programming distributor ("MVPD") in New York City, also addressed home wiring issues in recent ex parte meetings that it held with Commission staff members.

Time Warner submits these comments at the specific suggestion of Meredith Jones, Chief of the Cable Services Bureau, who advised Shirley Daniels of Paragon Cable Manhattan, a Time Warner affiliate, that Time Warner's position on the specific issue of sharing home wiring with another MVPD should be submitted to the Commission in writing as soon as possible. Accordingly, Time Warner's position on this issue, and on the related issue of the point of demarcation, both of which have been set forth in previous pleadings in the above-referenced proceedings, is stated again herein for the Commission's ease of reference.

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I. Cable Operators Should Not Be Forced To Share Home Wiring With Other MVPDs While They Are Providing Cable Service To Subscribers Over That Wiring.

Time Warner has repeatedly explained to the Commission that, not only is simultaneous use of internal wiring by the cable operator and other MVPDs beyond the scope of the 1992 Cable Act, but it is also physically, technically and practically implausible, and further results in an unconstitutional taking of the cable operator's property. Thus, any proposed amendments to the home wiring rules that would mandate "sharing" any portion of a cable operator's plant, including home wiring, while the subscriber is continuing to receive service from that cable operator, should not be adopted.

The Commission's home wiring rules provide that such rules shall apply only "after a subscriber voluntarily terminates cable service,"¹ and not while the cable operator is still providing cable service over the home wiring. This rule is completely consistent with the mandate of the 1992 Cable Act, which states that "the Commission shall prescribe rules concerning the disposition, after a subscriber to a cable system terminates service, of any cable installed by the cable operator within the premises of such subscriber."² Despite Congress' clear mandate, and the Commission's promulgation of rules in accordance with that mandate, Liberty has, nevertheless, urged the Commission to amend the home wiring rules to allow competitors to "share" home wiring, even while the incumbent cable operator continues to provide cable service over that wiring.³ The Commission has, thus far, wisely refused to extend the home wiring rules to apply prior to termination of cable service, and should continue to do so in light of constitutional concerns and Congress' express direction.

Liberty further espouses the position that it is possible for more than one MVPD to provide services over internal wiring simultaneously. As has been explained to the Commission during ex parte meetings regarding cable home wiring, given the current technical design and architecture used in the cable television industry, cable home wiring is simply not physically capable of

¹47 C.F.R. § 76.801 (emphasis added).

²47 U.S.C. § 544(i) (emphasis added).

³See Liberty Comments in RM-8380 at 2 (Liberty proposes unrestricted access to cable home wiring from the time the wire is installed).

simultaneously transmitting two or more video signals over the same frequency bands.⁴

On a strictly theoretical level, it might be possible for two MVPDs to offer services over different portions of the frequency spectrum of the same coaxial wiring, assuming that the existing MVPD is not using the entire spectrum or has no plans to do so in the future,⁵ but such a procedure presents highly complex engineering difficulties and is not at all workable as a practical matter. An example should readily demonstrate the folly of any suggestion that home wiring can be "shared." Assume that the existing cable operator will not need the bandwidth above 1 GHz to provide programming and other services to its subscribers, and that state-of-the-art low loss coaxial cable is used to distribute signals within the home. Other MVPDs might argue that they should be allowed to "share" the "unused" portion of the home wiring (above 1 GHz) and thereby offer services to the homeowner at the same time that the cable operator is delivering its services.

Even if it were theoretically possible to authorize such "sharing" of home wiring, it would require development of specialized electronic equipment that is not currently available. For example, an expensive signal combiner would have to be installed at the point of demarcation to allow the combination of two sets of signals in different frequency bands,⁶ along with filters to keep the two sets of signals from "bleeding" together. Similar equipment would have to be installed within the

⁴Cable home wiring is different from telephone inside wiring in that telephone wiring is "dead" when not being used to place or receive an outside call. Thus, telephone wiring is susceptible to other uses during such periods by the telephone customer. Cable signals, on the other hand, are constantly being transmitted through all cable home wiring, even when all the television sets in the home are turned off. Liberty appears to ignore this crucial distinction in its relentless campaign for rules mandating the shared use of cable home wiring.

⁵Time Warner currently plans to rebuild and upgrade most of its systems to 750 MHz in the downstream path, with an upstream path for the interactive services up to 1 GHz (including the plex filter cross-over frequency band).

⁶To further complicate matters, such devices may require electrical power at the point of demarcation, where power is often unavailable and acute grounding and fire hazard problems might be created.

customer's premises to segregate the services offered by various providers. In addition, special converters would have to be developed that operate only on the frequencies not being used by the existing cable operators. The cost of such electronic components alone would substantially exceed the price of simply installing a second drop cable within the home. Moreover, as detailed below, insurmountable technical difficulties would be created.

First, the cable operator is under an obligation to meet a variety of FCC-imposed rules on signal quality. The nature of television signals carried on coaxial cable is such that each additional signal interacts to some degree with all signals that are already carried. When the cable operator provides a group of signals to a subscriber, these interactions have all been carefully balanced to achieve the goals of high quality video with low amounts of interference. In most systems, the addition of even one additional channel that is not phase locked to all other channels, or provided by the cable operator in its carefully balanced mixing process at the headend, could lead to the disruption of the entire set of channels offered by the cable operator. This disruption would take the form of noticeable interference in all services. This interference not only would be annoying to the customer, but it would violate FCC-imposed regulations for signal quality.

Second, in order for a second service provider to use the upper bandwidth of home wire, either the second provider must send a higher signal level off the tap, or additional amounts of amplification would be required (this is needed because the upper bandwidths have more attenuation or loss on this type of cable than the lower frequencies). Such amplification would typically occur at the point of demarcation. In such event, the signals delivered by the cable operator may be amplified to a point where they cause distortion in the consumers' television and VCR (or, if the amplifier were designed to amplify only the range of signals above 1 GHz, some portion of the cable signals would suffer from what is known as "roll off" because of the filtering needed to allow partial amplification of the bandwidth).

In order to correct all of these problems, one would have to do some very expensive filtering and isolating of one set of signals from the other. This would require additional equipment at the attachment point (*i.e.*, the point of demarcation) where two providers, one being the cable operator who had installed the network to start with and the other being the new entrant who wishes to obtain a "free ride" on the cable operator's drop, as well as requiring filtering and amplification placed in the home. All of this would be very costly in economic terms, very

disruptive to the consumer, and leave the question: when something is wrong with noise, interference, distortion, picture quality, or with any of the other technical parameters that customers expect, who exactly is responsible for fixing it, and who will be charged for such service calls? Moreover, who will moderate between the providers using the wiring when they seek to place blame for such technical problems on each other?

Third, it is critical that any equipment used to allow "sharing" of home wiring is installed so as to meet the FCC's rules and regulations on signal leakage, as well as the incumbent provider's design and technical operational specifications. Any filtering or amplification of signals on this line could cause the customer equipment to radiate cable signals in excess of the FCC's mandated leakage limits. These signal leakage limits are not related to the quality of video; they are related to safety of life issues. The Commission and other users of over-the-air spectrum do not look favorably on techniques that increase the amount of leakage from a cable plant. Installation of extraneous equipment in an effort to achieve "sharing" of home wiring increases the risk of signal leakage problems and renders it virtually impossible to identify the party responsible for any such violations.

Fourth, if the Commission were to force a cable operator to yield some portion of the frequency of its wiring, while it was still providing cable service to a subscriber, the cable operator would necessarily be limited in the bandwidth it could use to provide its service. This could easily result in a reduction of quantity and quality of cable programming, thereby restricting consumer choice, in direct contravention with the stated intent of the 1992 Cable Act.⁷ Specifically, Time Warner has continually expanded the bandwidth over which it provides cable service to its subscribers.⁸ Every time a system is upgraded,

⁷1992 Cable Act, Pub. L. 102-385, 106 Stat. 1460, § 2(b)(3) (1992) ("It is the policy of the Congress in this Act to . . . ensure that cable operators continue to expand, where economically justified, their capacity and the programs offered over their cable systems.").

⁸For example, most cable systems started out using 220 MHz of spectrum in the 1960's. Cable systems subsequently expanded from 220 MHz to 300 MHz, to 400 MHz, to 450 MHz, then to 550 MHz. Now, many systems, including Time Warner's New York City cable systems, are being upgraded to 750 MHz, with some portions being upgraded to 1 GHz. Time Warner intends to continue expanding its
(continued...)

the bandwidth increases. If Time Warner, or any cable operator, were forced to yield some portion of its signal capacity to another MVPD, it would not physically be able to deliver the full panoply of its service offerings over the remaining portion of frequency allocated to it in its own wiring.⁹ The division of spectrum frequency within coaxial wiring also raises the issue of who will be charged with determining how much, or what portion, of the spectrum will be allocated to which MVPD. For example, if an operator is currently using 1 GHz and is forced to "share" frequencies above 1 GHz with another MVPD, will the initial operator be allowed to reclaim such frequency blocks if channel capacity is expanded? If not, would the initial operator be prevented from upgrading channel capacity city-wide just because another MVPD, like Liberty, is cherry-picking a few affluent MDU buildings? Such issues are unlikely to be resolved easily, especially in light of fifth amendment taking concerns.¹⁰

Liberty's proposal that cable operators be forced to yield a portion of their home wiring to the transmission of other services also requires cable operators to convert a portion of their proprietary infrastructure into a common carrier facility. Congress has expressly admonished against such a misapplication of the home wiring provision, warning that it "does not intend that cable operators be treated as common carriers with respect to the internal cabling installed in subscribers' homes."¹¹ By this, Congress meant that cable home wiring was not to be treated like telephone inside wiring, over which subscribers have control during the course of receiving service. Indeed, Liberty's proposal would directly contravene Section 621(c) of the Cable Communications Policy Act of 1984, which was left unchanged by the 1992 Cable Act, and provides that:

⁸(...continued)
systems into the upper portion of spectrum frequency in order to provide better and more programming to its subscribers.

⁹See National Cable Television Association Comments in RM-8380 at 10; Time Warner Reply Comments in RM-8380 at 16.

¹⁰See infra at notes 13-16 and accompanying text.

¹¹H.R. Rep. No. 628, 102d Cong., 2d Sess. 118-19 (1992) ("House Report").

Any cable system shall not be subject to regulation as a common carrier or utility by reason of providing any cable service.¹²

Finally, if Time Warner were forced to share its home wiring with another MVPD, as Liberty has proposed, the home wiring rules would be rendered an unconstitutional violation of the taking clause.¹³ Cable home wiring is presumed to be the personal property of the cable operator unless or until the cable operator yields its ownership of such wiring by agreement.¹⁴ Congress did not intend for the Commission to establish rules that result in an unconstitutional taking without payment of just compensation. Moreover, just compensation must be determined in an adjudicatory proceeding, not by some binding calculation set forth in an agency rule.¹⁵ Thus, the Commission cannot simply remedy the unconstitutionality of the taking by implementing a rule setting forth what compensation shall be given in exchange for taking a cable operator's property; such a rule would itself be unconstitutional.¹⁶

The Commission simply should not amend its home wiring rules so that they violate express orders of Congress and the Constitution.

II. The Commission Should Not Amend The Point Of Demarcation For Cable Home Wiring In MDUs.

The Commission's rules provide that, for both single unit and multiple dwelling unit ("MDU") installations, the internal wiring begins at the demarcation point, which "shall be a point at (or about) twelve inches outside of where the cable wire enters the subscriber's premises, . . . [or] . . . dwelling

¹²47 U.S.C. § 541(c).

¹³U.S. Const. amend. V ("nor shall private property be taken for public use, without just compensation").

¹⁴See, e.g., Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982).

¹⁵See Florida Power Corp. v. FCC, 772 F.2d 1537, 1546 (11th Cir. 1985), rev'd on other grounds, 480 U.S. 245 (1987) ("The determination of just compensation is clearly a judicial function.")

¹⁶See id.

unit."¹⁷ Liberty has urged the Commission to amend the demarcation point in MDUs to be "the point where an alternate provider can access individual wiring . . . without physically damaging the MDU premises or interfering with the provision of cable service to other residents of the MDU."¹⁸ Thus, the point of demarcation could, under Liberty's proposal, extend hundreds of feet outside the subscriber's dwelling unit, and even all the way to the distribution box, which is often located in a common area of the MDU. Such a rule would directly contravene Congress' intent that home wiring rules are "not intended to cover common wiring within the [MDU], but only the wiring within the dwelling unit of individual subscribers."¹⁹

In most situations, particularly in New York City where Time Warner and Liberty compete for subscribers, home wiring is accessible twelve inches outside the point where the wiring enters the subscriber's dwelling unit because the majority of MDUs employ "homerun" configuration where the cable is located in readily accessible public areas such as hallways, and is often enclosed in wiremold which allows convenient splices by other MVPDs.²⁰ Liberty's claim that, in most situations in New York City, it cannot access cable wiring twelve inches outside the point of entry into a subscriber's dwelling unit is simply disingenuous. Situations where homerun cable is inaccessible without invading the subscriber's dwelling unit or causing significant physical damage to walls, floors, or ceilings in which cable or conduit housing cable may be cased is certainly the exception rather than the norm.

Given that Liberty has proposed a demarcation point that is beyond the scope of the 1992 Cable Act, and that is unnecessary in the majority of MDUs that Liberty serves or desires to serve, the Commission should not adopt a demarcation point that extends

¹⁷47 U.S.C. §§ 76.5(11), (mm).

¹⁸Liberty Ex Parte Notices in MM Docket 92-260, dated July 28, 1993 and September 24, 1993.

¹⁹House Report at 119 (emphasis added).

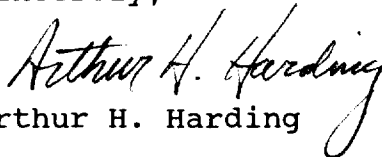
²⁰See generally Time Warner Entertainment Company, L.P. Response to Ex Parte Notices in MM Docket 92-260, dated December 16, 1993, at 2-3 (explanation of different types of video distribution architecture employed in MDUs and accessibility of wiring in various types of installations, with emphasis on accessibility of wiring in the majority of MDUs in New York City).

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hundreds of feet outside the subscriber's dwelling unit. Rather, as Time Warner has proffered repeatedly, in situations where home wiring is inaccessible twelve inches outside the point of entering the subscriber's dwelling unit, the point of demarcation should be at the wallplate, where the internal wiring clearly becomes accessible, so that the home wiring rules do not cover any common wiring within the MDU building in contravention of Congress' intent.²¹ Furthermore, a wallplate point of demarcation alleviates the risk of conversion and unfair competition that would accompany a demarcation point hundreds of feet outside the subscriber's dwelling unit.

Time Warner urges the Commission not to amend its home wiring rules according to proposals set forth by Liberty. Rather, the Commission should consider the practical application of the rules, and Congress' intent, and establish rules that are both workable and fair to the parties involved.

Sincerely,


Arthur H. Harding

cc: Meredith Jones
Patrick Donovan
Olga Madruga-Forti
Marian R. Gordon
John Wong

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²¹See House Report at 118.